Supreme Court, U.S.
F I L E D
AUG 16 1996
CLERK

No. 95-1723

In The

Supreme Court of the United States

October Term, 1995

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA, and JOANNE SIRAGUSA,

Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., and BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

ERVEN T. NELSON
ALVERSON, TAYLOR,
MORTENSEN & NELSON
3821 West Charleston Blvd.
Las Vegas, Nevada 89102
(702) 384-7000

RANDALL M. RUMPH
BARRY SHINEHOUSE
RUMPH & PEYTON
302 East Carson Avenue
Las Vegas, Nevada 89101
(702) 388-4466

RICHARD A. SAUBER*
MICHAEL L. WALDMAN
JONATHAN S. ARONIE
DAVID B. WISEMAN
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
1001 Pennsylvania Avenue, N.W.
Suite 900
Washington, DC 20004-2505
(202) 639-7000

DAVID B. SMITH
ENGLISH & SMITH
526 King Street, Suite 213
Alexandria, Virginia 22314
(703) 548-8911

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a civil RICO action accrues prior to the conclusion of the bankruptcy proceedings where the defendants' unlawful scheme is based on fraudulently obtaining a discharge of a pre-existing debt and where plaintiff may suffer no injury until the final discharge in bankruptcy.

2. Whether a civil RICO action accrues when the plaintiff knows or should know that she has been injured, even though she does not know that her injury was part of a pattern of racketeering activity or that defendants caused her injury.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 9

ARGUMENT 14

I. PLAINTIFF'S PRE-EXISTING DEBT HAS NOT YET BEEN AFFECTED BY THE DEFENDANTS' RICO ACTIVITY AND THUS NO RICO ACTION COULD ACCRUE 14

A. Plaintiff Must Suffer Concrete Injury To Business Or Property To Bring A Civil RICO Action 14

B. A Non-RICO Debt Becomes A RICO Injury Only When It Is "Lost," And Joanne Has Not Yet "Lost" Her Property Settlement Debt... 19

C. Because The Relief That Joanne Sought Through Her Bankruptcy Complaint – *i.e.*, Equitable Relief – Is Not Available To A Civil RICO Plaintiff, A RICO Claim Would Have Been Premature Prior To The Resolution Of The Bankruptcy Proceedings 23

TABLE OF CONTENTS – Continued

Page

II. THE "INJURY AND PATTERN DISCOVERY" ACCRUAL RULE IS REQUIRED BY THE CIVIL RICO STATUTE AND BY GENERAL PRINCIPLES OF ACCRUAL 26

A. The Language, Structure And Policies Of The Civil RICO Statute Compel The "Injury And Pattern Discovery" Rule 26

B. General Principles Of Accrual Compel The Adoption Of The "Injury And Pattern Discovery" Rule 34

C. An "Injury And Pattern Discovery" Accrual Rule Would Avoid Anomalous And Inappropriate Results 41

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Acha v. Beame, 570 F.2d 57 (2d Cir. 1978) 38

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987) ..... *passim*

Amy v. Dubuque, 98 U.S. 470 (1878) 42

Aparicio v. Norfolk & Western Railway Co., 84 F.3d 803 (6th Cir. 1996) 39

Association of Commonwealth Claimants v. Moylan, 71 F.3d 1398 (8th Cir. 1995) 49

Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874) 31

Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) ..... *passim*

Barnett v. Stern, 909 F.2d 973 (7th Cir. 1990) 18

Bennett v. Centerpoint Bank, No. 91-1603, 1991 U.S. App. LEXIS 32856 (1st Cir. Dec. 31, 1991) 11, 20, 21, 23

Berg v. First State Insurance Co., 915 F.2d 460 (9th Cir. 1990) 11, 22

Bingham v. Zolt, 66 F.3d 553 (2d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1418 (1996) 27

Bivens Gardens Office Bldg., Inc. v. Barnett Bank, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991) 33

Briley v. State of California, 564 F.2d 849 (9th Cir. 1977) 32

Cook County v. Berger, 648 F. Supp. 433 (N.D. Ill. 1986) 38

TABLE OF AUTHORITIES – Continued

Page

First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 728 (1995) 11, 21, 22

Fowkes v. Pennsylvania Railroad Co., 264 F.2d 397 (3d Cir. 1959) 38

Goodhand v. United States, 40 F.3d 209 (7th Cir. 1994) 36

Granite Falls Bank v. Henrikson, 924 F.2d 150 (8th Cir. 1991) 9, 28, 39, 40, 47

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) 13, 39, 44

Harold Friedman Inc. v. Thorofare Markets Inc., 587 F.2d 127 (3d Cir. 1978) 39

Harrison v. United States, 708 F.2d 1023 (5th Cir. 1983) 36

Hartford Life Insurance Co. v. Title Guarantee Co., 520 F.2d 1170 (D.C. Cir. 1975) 18, 32

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 12, 37, 38, 39

Held v. Gulf Oil Co., 684 F.2d 427 (6th Cir. 1982) 38

Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) 30

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 31

Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594 (3d Cir. 1991), *cert. denied*, 504 U.S. 955 (1992) 44

Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993) 14

TABLE OF AUTHORITIES – Continued

Page

In re Buckallew, 172 B.R. 927 (Bankr. W.D. Mo. 1994) 3

In re Eashai, 87 F.3d 1082 (9th Cir. 1996) 30

In re Fredeman Litigation, 843 F.2d 821 (5th Cir. 1988) 24, 25

Keystone Insurance Co. v. Houghton, 863 F.2d 1125 (3d Cir. 1988) 9, 27, 29, 33, 40, 42

Klehr v. A.O. Smith Corp., 87 F.3d 231 (8th Cir. 1996) 49

La Porte Construction Company, Inc. v. Bayshore National Bank, 805 F.2d 1254 (5th Cir. 1986) 32

Lavellee v. Listi, 611 F.2d 1129 (5th Cir. 1980) 35

Lincoln House, Inc. v. Dupre, 903 F.2d 845 (1st Cir. 1990) 11, 20

McCool v. Strata Oil Co., 972 F.2d 1452 (7th Cir. 1992) 40, 45

Mullinax v. McElhenney, 817 F.2d 711 (11th Cir. 1987) 36

Nasim v. Warden, Maryland House of Correction, 64 F.3d 951 (4th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1273 (1996) 36

Nicolazzo v. United States, 786 F.2d 454 (1st Cir. 1986) 35

Northern Trust Bank v. Inryco, Inc., 615 F. Supp. 828 (N.D. Ill. 1985) 30

Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994) 39

TABLE OF AUTHORITIES – Continued

Page

Outman v. United States, 890 F.2d 1050 (9th Cir. 1989) 35

Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) 11, 24, 25

Religious Technology Center v. Wollersheim, 971 F.2d 364 (9th Cir. 1992) 13, 44

Riddell v. Riddell Washington Corp., 866 F.2d 1480 (D.C. Cir. 1989) 45

Rodriguez v. Banco Cent., 917 F.2d 664 (1st Cir. 1990) 45, 49

Rozar v. Mullis, 85 F.3d 556 (11th Cir. 1996) 36

Santana v. United States, 693 F. Supp. 1309 (D.P.R. 1988) 36

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 9, 14, 28, 33, 40

State Farm Mut. Auto Ins. Co. v. Ammann, 828 F.2d 4 (9th Cir. 1987) 45

Stewart v. Parish of Jefferson, 951 F.2d 681 (5th Cir.), *cert. denied*, 506 U.S. 820 (1992) 36

Stochastic Decisions, Inc. v. DiDomenico, 995 F.2d 1158 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993) 15

Sun Savings & Loan Ass'n v. Dierdorff, 825 F.2d 187 (9th Cir. 1987) 44

United States v. Blizzard, 27 F.3d 100 (4th Cir. 1994) 18

United States v. Del Percio, 870 F.2d 1090 (6th Cir. 1989) 18

United States v. Guglielmini, 425 F.2d 439 (2d Cir.), *cert. denied*, 400 U.S. 820 (1970) 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Knoll, 16 F.3d 1313 (2d Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 574 (1994) 18

United States v. Kubrick, 444 U.S. 111 (1979) 12, 34, 35, 36

United States v. Lindsay, 346 U.S. 568 (1954) 42

United States v. Turkette, 452 U.S. 576 (1981) 30

Urie v. Thompson, 337 U.S. 163 (1949) 48, 49

Wilcox v. Executors of Kemp Plummer, 29 U.S. (4 Pet.) 172 (1830) 42

Wolin v. Smith Barney Inc., 83 F.3d 847 (7th Cir. 1996) 30, 37

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 10, 17

STATUTES

11 U.S.C. § 523(a) (1982) 3

11 U.S.C. § 524(a)(1) & (2) (1994) 16

11 U.S.C. § 524(c)-(d) (1994) 16

11 U.S.C. § 544(a) (1988) 4

11 U.S.C. § 548 (1988) 4

11 U.S.C. § 727(a) (1994) 16

11 U.S.C. § 727(d) (1988) 4

18 U.S.C. § 152 (1988) 6

18 U.S.C. § 664 (1994) 29

18 U.S.C. §§ 891-894 (1994) 29

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1341 (1994) 6, 29

18 U.S.C. § 1343 (1994) 6, 29

18 U.S.C. § 1503 (1988) 6

18 U.S.C. § 1954 (1994) 29

18 U.S.C. §§ 1961-1968 (1994) ..... *passim*

18 U.S.C. § 3284 (1994) 10, 18

28 U.S.C. § 1254(1) (1994) 1

RULES & REGULATIONS

Fed. R. Civ. P. 9(b) 44

Fed. R. Civ. P. 12(b)(6) 2

17 C.F.R. 240.10b-5 6

OTHER AUTHORITIES

Report of the Ad Hoc Civil RICO Task Force of the American Bar Association Section on Corporations, Banking & Business Law (1985) 29

54 C.J.S. *Limitations of Actions* § 192 (1987) 32

1 GINSBERG & MARTIN ON BANKRUPTCY (4th ed. 1996) 15

Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 Minn. L. Rev. 827 (1987) 42

2 MATTHEWS, WEISSMAN & STURC, CIVIL RICO § 8.05 (2d ed. 1992) 24, 30

TABLE OF AUTHORITIES – Continued

Page

Paul B. O'Neill, *Mother of Mercy, Is This The Beginning of RICO? The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. Rev. 172 (1990) 28, 42

DAVID SMITH & TERRANCE REED, CIVIL RICO § 4.04 (1992) 30

S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969) 30

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-25a) is reported at 75 F.3d 506. The opinion of the United States District Court for the District of Nevada dismissing the complaint (Pet. App. 26a-34a) is unreported. The opinion of the district court denying petitioners' motion for reconsideration (Pet. App. 35a-43a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1996. The petition for a writ of certiorari was filed on April 22, 1996, and was granted June 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant federal statutory provisions are the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994), which was passed as Title IX of the Organized Crime Control Act of 1970 (Act of October 15, 1970, Pub. L. No. 91-452, 84 Stat. 922, as amended).

STATEMENT OF THE CASE

This case involves an unlawful scheme orchestrated by attorney Patricia Brown and doctors Vincent Siragusa and John Bowers to defraud plaintiff Joanne Siragusa of the multi-million dollar divorce settlement debt which was owed her by Dr. Vincent Siragusa and partially

secured by a lien on his medical practice. Defendants also engaged in a scheme to defraud Dr. Paul Heeren of his interest in the medical practice, which was the largest cardiology medical practice in the State of Nevada. As a consequence of defendants' unlawful and fraudulent activities, Dr. Bowers became the sole owner of the medical practice and, with the active participation of Brown, engaged in further fraudulent transactions relating to the sale of a minority interest in the practice to a number of other physicians. In this RICO action, Joanne Siragusa seeks to recover for injuries that she has suffered as a result of Patricia Brown's wrongful conduct.

Because this case was dismissed by the district court in response to a motion to dismiss under Fed. R. Civ. P. 12(b)(6) filed at the outset of the case,[1] the factual allegations in the Complaint are taken as true and are not in dispute.[2]

1. Vincent and Joanne Siragusa divorced in 1983. At that time, Vincent owned a one-third interest in a cardiology practice called the Heart Institute of Nevada ("HIN"); Drs. Paul Heeren and John Bowers held the remainder equally.[3] As part of the divorce, Joanne agreed

---

[1] Although the court of appeals characterized defendant Brown's motion as one for summary judgment (Pet. App. 6a), defendants offered no declarations, documents or other evidence addressing the substantive allegations in the Complaint.

[2] Except as noted, this statement of the facts follows the factual recitation in the opinion of the court of appeals.

[3] This was not the only organization in which Vincent Siragusa owned a share. He also owned 33% in the Heart Institute Cath Lab ("HICL") and 27.55% in the Heart Institute Property ("HIP"). These organizations are collectively known as "the medical practices."

to release her one-half community property interest in Vincent's ownership share in the medical practices in exchange for monthly payments. Joanne perfected a security interest in Vincent's share of the practices to protect her in the event that Vincent defaulted on his payments. When Vincent defaulted in 1987, Joanne secured a state court judgment for the full amount of his debt. This judgment was for an amount in excess of $1.4 million.

Within days of this state court judgment, Vincent filed for bankruptcy under Chapter 7 of the U.S. Bankruptcy Code. With the active participation of attorney Patricia Brown, Vincent submitted in the bankruptcy proceedings a number of false and fraudulent schedules, letters, and other documents which claimed that he lacked the assets to pay his debt to Joanne. Principally, he claimed that he no longer owned his interest in the medical practices. Vincent asserted in these false bankruptcy pleadings that he was forced to sell his interest in the medical practices at a loss and to become a mere employee when the practices were reorganized into the Cardiology Associates of Nevada ("CAN"). Relying on these assertions regarding the fraudulent reorganization, Vincent sought from the bankruptcy court a discharge of the $1.4 million judgment obtained by Joanne, as well as his other debts.[4]

In May 1989, Joanne and Vincent's bankruptcy trustee, Tom Grimmett, filed an adversary complaint in bankruptcy court on behalf of Vincent's estate seeking to

---

[4] Because the bulk of Joanne's state court judgment against Vincent was based on her community property settlement and was not alimony or child support, this judgment was subject to being discharged in a bankruptcy proceeding. 11 U.S.C. § 523(a); *see, e.g., In re Buckallew*, 172 B.R. 927 (Bankr. W.D. Mo. 1994).

set aside Vincent's purported transfers of the various medical practices as fraudulent conveyances and challenging any bankruptcy discharge of Vincent.[5] (J.A. 186) Joanne alleged that Vincent, along with Dr. Bowers and Dr. Heeren, had conspired to cheat Joanne out of the monies owed her which were secured by her lien on Vincent's interest in the practices.[6] Joanne alleged that because of secret side agreements, Vincent continued to make as much money as he did before and retained a "sub rosa" interest in the medical practices. In this adversary bankruptcy complaint, Joanne charged that the reorganization amounted to a "common plan . . . to defraud [her] out of her rights under the Divorce Instruments." (J.A. 214-15)

In December 1990, Joanne learned for the first time that Dr. Heeren had also been the victim of various fraudulent reorganizations and that Patricia Brown had been a principal architect of these unlawful schemes. At that time, Dr. Heeren came forward and provided Joanne with an affidavit concerning the fraudulent reorganizations and bankruptcy pleadings. In the affidavit dated December 28, 1990, Dr. Heeren explained that he, too, had been defrauded by the reorganization schemes. Although

---

[5] The adversary complaint sought to set aside the fraudulent conveyance under 11 U.S.C. §§ 548 and 544(a) and the Nevada Uniform Fraudulent Transfer Act and to challenge the discharge under 11 U.S.C. § 727(d).

[6] Contrary to the statement of facts in the Ninth Circuit's opinion, the adversary complaint in bankruptcy court clearly did *not* allege that HIN's attorney, Patricia Brown, was involved in the conspiracy to cheat Joanne. Brown's role in the illegal conspiracy was not known to petitioners until December 1990 when Dr. Heeren disclosed it. Until that time, petitioners indulged the reasonable assumption that HIN's attorney was not culpably involved in her client's wrongdoing.

Dr. Heeren was supposed to have received his same share of profits under the side agreements, he had not. In his affidavit, Dr. Heeren also noted that Patricia Brown had masterminded the schemes to defraud Joanne and Heeren and take over the medical practice.

In February 1991, Joanne filed an amended adversary complaint in bankruptcy, adding Brown and her law firm, Beckley, Singleton, Delanoy, Jemison & List, as defendants in that action. However, by orders entered on September 1, 1993 and January 5, 1994, the district court dismissed Joanne's claims in bankruptcy against Brown and the law firm, ruling that the bankruptcy court lacked subject matter jurisdiction to resolve these claims.[7]

2. In November 1993, Joanne and Grimmett filed this civil RICO action in federal court against Patricia Brown and her law firm.[8] (J.A. 16) Their Complaint alleged a pattern of racketeering activity having four goals: (1) to acquire and maintain Vincent's medical practice interest by fraud, and thereby deprive Joanne of the monies owed her which were secured by Vincent's interest in the medical practice; (2) to acquire and maintain Dr. Heeren's medical practice interest by fraud; (3) to defraud the CAN junior stockholders;[9] and (4) to obstruct

---

[7] In 1990 and 1991, the bankruptcy judge had ruled that she did have jurisdiction over Joanne's claims.

[8] In 1992, Dr. Bowers settled out of court with petitioners and therefore was not named as a party in this case.

[9] Joanne also had learned that, from April 1991 to November 1991, Dr. Bowers sold 49% of CAN's stock ownership to CAN's doctor-employees. At that time, Dr. Bowers and attorney Brown falsely assured the junior stockholders that Joanne's 1989 bankruptcy complaint exposed CAN to at most $250,000 in liability. They did not tell the junior stockholders that Joanne also sought to undo the reorganization. When Dr.

justice. The Complaint also asserted that Brown masterminded the entire unlawful scheme. The alleged scheme included numerous federal law violations as RICO predicate acts, including bankruptcy fraud (18 U.S.C. § 152), mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), obstruction of justice (18 U.S.C. § 1503), and fraud in the sale of securities under various securities laws (*e.g.*, 17 C.F.R. 240.10b-5). The Complaint also alleged several state law violations, including grand larceny, embezzlement, obtaining money by false pretense, perjury or subornation of perjury, offering false evidence, and securities fraud. (J.A. 40-47)

Brown and her law firm ("Beckley") moved to dismiss the RICO suit as barred by the four-year statute of limitations. The defendants claimed that Joanne and Grimmett knew of their injury in May 1989 when they filed the adversary complaint in bankruptcy court. Brown and Beckley argued that the district court should invoke an "injury discovery" rule, under which a civil RICO cause of action accrues once the plaintiff reasonably discovers her injury. Defendants asserted that, because the civil RICO action was filed more than four years after Joanne and Grimmett knew of the injury, it was barred under RICO's four-year statute of limitations period.

In response, Joanne and Grimmett argued that although they were aware of Joanne's injury by May 1989, they were not aware that there were other victims of the scheme and that their injury was part of a pattern of racketeering activity. They also were unaware of Patricia Brown's role as an active and willing participant in

---

Bowers settled with plaintiffs, CAN was required to pay substantially all of the $1.4 million settlement payment.

this wrongdoing when they filed their adversary proceeding in bankruptcy. Petitioners argued that a civil RICO action does not accrue until the plaintiff discovers that her injury was part of a pattern of racketeering activity and defendants' involvement in the RICO scheme. Under the "injury and pattern discovery" accrual rule followed by several circuits, petitioners' RICO claims did not accrue until December 1990, when Dr. Heeren revealed the scope of the fraudulent scheme and the fact that he too was victimized by it. Until that time petitioners had no basis for alleging a pattern of racketeering activity or for charging Brown and her law firm with any wrongdoing.

Joanne and Grimmett also argued that the accrual of the statute of limitations period should not run during the course of the bankruptcy proceedings. Petitioners relied upon a line of cases beginning with *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d. Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989), to support their argument. In closely comparable circumstances involving bankruptcy proceedings, the *Bankers Trust* court held that a RICO action does not accrue before the existence and amount of any injury becomes clear. Because petitioners might suffer no injury depending on the outcome of the bankruptcy proceedings, *Bankers Trust* and subsequent cases held that the time for bringing a civil RICO action should not begin to run until after the bankruptcy. In addition, because Brown actively concealed her wrongdoing from petitioners, the doctrine of fraudulent concealment should also toll the running of the limitations period.

The district court dismissed the complaint. The court "recognize[d] that when plaintiffs filed their Adversary Proceeding complaint [in bankruptcy court], they may not have been aware, as they allege now, that defendant

Brown was involved in any allegedly fraudulent activity. Nevertheless, the rule in this Circuit focuses on when a plaintiff knew or should have known of his injury, and not when that plaintiff knew or should have known that a particular person caused that injury." (Pet. App. 32a) The district court failed to address petitioners' arguments in support of the "injury and pattern discovery" accrual rule, except to note that that was not the accrual rule followed in the Ninth Circuit. The court also rejected petitioners' arguments that the statute of limitations should not run until after the bankruptcy proceedings, concluding in response to petitioners' motion for reconsideration that the *Bankers Trust* line of cases was unpersuasive. (Pet. App. 35a-45a)

3. The court of appeals affirmed, rejecting each of petitioners' alternative limitations argument. (Pet. App. 1a-25a) The panel recognized that there was a clear disagreement among the circuit courts as to when a RICO cause of action should accrue, with at least five courts of appeals finding the "injury discovery" rule to be too restrictive for plaintiffs. Nevertheless, the panel perceived the "injury discovery" rule to be existing Ninth Circuit law and thought that petitioners' criticisms of the "injury discovery" rule were not "persuasive enough to warrant abandonment" of that rule in favor of the "injury and pattern discovery" rule. (Pet. App. 12a) The court also rejected petitioners' argument that the statute of limitations should not run during the pendency of the bankruptcy because plaintiffs may suffer no injury depending on the result of the bankruptcy proceeding. Although acknowledging that petitioners would prevail if the *Bankers Trust* line of cases were the law in the Ninth Circuit (Pet. App. 23a-24a), the court of appeals flatly disagreed with that line of authority. (Pet. App. 22a-25a)

4. Joanne and Grimmett subsequently sought review by this Honorable Court with respect to two issues. First, they asked this Court to examine the Ninth Circuit's decision as to what accrual rule applies to a civil RICO cause of action. At least three different accrual rules are currently applied by the various judicial circuits: the "injury discovery" rule, *see, e.g., Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); the "injury and pattern discovery" rule, *see, e.g., Granite Falls Bank v. Henrikson*, 924 F.2d 150 (8th Cir. 1991); and the "last predicate act" rule, *see, e.g., Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). (Pet. App. 7-13) Second, they asked this Court to determine whether a civil RICO cause of action can accrue prior to the conclusion of bankruptcy proceedings where the existence or extent of any injury will depend on the outcome of the bankruptcy proceedings. A number of courts of appeals have followed the *Bankers Trust* line of cases, which the Ninth Circuit rejected in dismissing petitioners' claim. (Pet. App. 13-17)

This Court granted certiorari as to both questions on June 17, 1996.

SUMMARY OF ARGUMENT

1. A RICO cause of action cannot exist without an "injury to business or property." *Sedima, S.P.L.R. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Here, it cannot be determined whether Joanne Siragusa will suffer such an injury until the conclusion of the bankruptcy proceedings. Vincent's property settlement debt to Joanne predated the RICO activity of the defendants. The RICO scheme, including the fraudulent reorganization of the medical practice and false bankruptcy filings, was aimed at

achieving a final discharge of Vincent's debt in the bankruptcy proceedings. The bankruptcy proceedings, however, have not yet concluded, as the bankruptcy trustee is still continuing to pursue assets of the estate. Only if Joanne is ultimately compelled to accept less than 100% of her pre-existing debts at the conclusion of the bankruptcy proceedings and the final discharge of Vincent's debt, will she have suffered an injury to business or property.

Although defendants have engaged in a pattern of racketeering activity in an attempt to defeat Vincent's pre-existing debt, the RICO injury may not occur unless or until a discharge is granted and Joanne receives less than the full amount owed her. Where a violation has already occurred but plaintiff has not yet been injured, a cause of action has not yet accrued. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). The Second Circuit has applied this principle to a defendant's attempt to obtain a fraudulent discharge of a debt in bankruptcy, holding that the RICO injury is incurred only when the trustee is unsuccessful in recovering the assets necessary to pay off the pre-existing debt. *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989). The statutory provision governing bankruptcy fraud also provides that the statute of limitations does not begin to run until final discharge of the debtor. 18 U.S.C. § 3284.

Vincent's pre-existing debt to Joanne is unaffected by the attempted fraudulent transfers and false bankruptcy filings. At most, these events reveal an attempt by the defendants to injure Joanne's security interest that protected the pre-existing property settlement debt. Until the debt is "lost" and the security interest is called upon and found insufficient, Joanne has suffered no RICO injury.

See Lincoln House, Inc. v. Dupre, 903 F.2d 845 (1st Cir. 1990); *Bennett v. Centerpoint Bank*, No. 91-1603, 1991 U.S. App. LEXIS 32856 (1st Cir. Dec. 31, 1991); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 728 (1995); *Berg v. First State Insurance Co.*, 915 F.2d 460 (9th Cir. 1990).

At the time that Joanne filed her adversary complaint in bankruptcy court – at which time, according to the court of appeals, her RICO claim accrued – she had suffered no "concrete financial loss." Neither the bankruptcy petition nor the fraudulent reorganization diminished Vincent's property settlement debt to Joanne. The lack of financial injury is demonstrated by Joanne's adversary complaint in bankruptcy which sought only equitable relief. Equitable relief is unavailable to RICO plaintiffs. *See Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). Joanne will not suffer a RICO injury unless or until her pre-existing debts are discharged as a result of the RICO activity at less than 100% of their full amount.

2. Although RICO does not contain a specific provision directly addressing accrual, RICO's language, structure and policies demonstrate that the statute of limitations should not begin to run until the plaintiff reasonably knows *both* her injury *and* that her injury was the result of a pattern of racketeering. "[T]he heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 154 (1987) (emphasis in original). In defining a "pattern of racketeering activity" as at least two predicate acts "the last of which occurred within ten years . . . after the commission of a prior act," 18 U.S.C. § 1961(5), the RICO statute plainly anticipated that proof of the RICO scheme would involve an examination of

defendant's activities up to ten years in the past. In addition, the predicate acts identified in RICO include numerous fraud-related violations. 18 U.S.C. § 1961(1). As a result, the potential plaintiff will face significant obstacles in discovering a RICO cause of action because the RICO scheme will likely involve uncovering multiple frauds operating through legitimate businesses and unions. The "injury and pattern discovery" rule is superior in that it recognizes the inherent problems that confront victims of fraud schemes in developing a RICO claim and ties the accrual of the civil RICO action to discovery of the RICO pattern. Furthermore, the "injury and pattern discovery" rule is consistent with the statute's mandate that RICO's provisions "be liberally construed to effectuate its remedial purpose." RICO, ch. 96, § 904(a), 84 Stat. 947 (1970).

The "injury and pattern discovery" rule also comports with general federal law principles of accrual. In *United States v. Kubrick*, 444 U.S. 111 (1979), the Court held that the limitations period would begin to run only after the plaintiff reasonably discovered the "factual predicate" underlying a claim, including the "critical facts" of the injury and who "inflicted the injury." Here, Joanne Siragusa did not know the "factual predicate" of her claim or that Patricia Brown had knowingly participated in these wrongful acts until Dr. Heeren came forward in December 1990 to describe the pattern of racketeering conduct. In federal fraud cases, courts also have required that plaintiff discover the fraud, and not just the injury, before the limitations period will begin to run. In addition, the Court's treatment of "continuing violations" postpones the commencement of the limitations period for older unlawful acts where some of the improper conduct is within the requisite limitations period. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) ("a 'continuing violation' of the Fair Housing Act should be treated differently from

one discrete act of discrimination," rejecting defendant's "wooden application" of the statute of limitations). Because RICO is plainly a continuing violation statute, *see H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S 229 (1989), the broader "injury and pattern discovery" accrual rule is appropriate.

The "injury and pattern discovery" accrual also is necessary to avoid anomalous and indefensible results. The most astounding outcome under the "injury discovery" accrual rule adopted by the court of appeals is that, where the two predicate acts are more than four years apart, a plaintiff's RICO action can be barred by the statute of limitations before her RICO cause of action ever existed. In fact, the "injury discovery" rule would enforce a de facto shortening of the statute of limitations in virtually every case, since the potential plaintiff would "lose" the time until the second predicate act takes place. In addition, the victim of a "closed-ended scheme" would suffer a constricted limitations period since courts have generally required at least one year of racketeering activity in such circumstances. *See Religious Technology Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992). The RICO plaintiff has a difficult burden, often having to discover a cause of action that does not exist until years after the plaintiff's injury and having to discover wrongs perpetrated against other victims. The "injury and pattern discovery" accrual rule takes this into account and allows the injured party sufficient time to investigate, discover, and prepare her RICO claim.

ARGUMENT

I. PLAINTIFF'S PRE-EXISTING DEBT HAS NOT YET BEEN AFFECTED BY THE DEFENDANTS' RICO ACTIVITY AND THUS NO RICO ACTION COULD ACCRUE

A. Plaintiff Must Suffer Concrete Injury To Business Or Property To Bring A Civil RICO Action

A RICO cause of action cannot exist without an injury to the plaintiff. This Court has made clear that, for purposes of civil RICO, a plaintiff only has standing to bring a claim once she "has been injured in [her] business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). This "injury to business or property" requirement has been characterized by the courts as a need to show a "concrete financial loss." *See, e.g., Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1310 (9th Cir. 1992) (citing *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299-1301 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990)), *cert. denied*, 507 U.S. 1004 (1993). In the absence of such a loss, a RICO claim is not ripe for adjudication.

The concrete RICO injury has not yet occurred in the instant case. As a result of her divorce proceedings, Joanne gave up her community property interest in Vincent's medical practice in return for regular property settlement payments. In addition, she was to receive alimony payments from Vincent. These debts predated the RICO activity of the defendants, who embarked on an illegal plan to defeat Vincent's legal debts to Joanne without losing control of the valuable assets owned by Vincent. The fraudulent reorganization of the medical practice and the fraudulent bankruptcy filings were the predicate acts designed to achieve the ultimate financial goal: the legal discharge of Vincent's debts without a diminution or loss of his substantial financial assets, *i.e.*, the medical practice. The scheme also aimed to

increase the value to the defendants of the medical practice by fraudulently defeating the ownership rights of Dr. Heeren.

Only if Joanne is compelled to accept less than 100% of her pre-existing debts at the conclusion of the bankruptcy proceeding and the discharge of Vincent's debt, will she have suffered an "injury to business or property." Yet, since the bankruptcy proceedings are not finally concluded, and since the bankruptcy trustee is still pursuing assets of the estate, it is as yet uncertain whether Joanne will be forced to accept less than 100% of her pre-existing property settlement debt. There still may be substantial recovery in bankruptcy of the fraudulently transferred assets which will then be used to repay creditors, including Joanne.

The mere filing of Vincent's bankruptcy petition did not injure the plaintiff. A bankruptcy petition, in actuality, has little legal effect with respect to a creditor's ability eventually to recover a debt. A bankruptcy petition, which acts as an "order of relief,"

> does not give the debtor relief as such. Instead, it sets the stage for the debtor to get relief at other points in that bankruptcy, such as discharge. These other points are separate proceedings, for the most part wholly independent of the order for relief.

1 GINSBERG & MARTIN ON BANKRUPTCY § 2.02[E] (4th ed. 1996). Even a fraudulent bankruptcy petition, which is dismissed without the discharge of any debts whatsoever, does not result in an actionable injury to the creditors. *See Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993).

A final bankruptcy discharge, on the other hand, has substantial legal effect. A discharge "voids any judgment at any time obtained . . . " and "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a

personal liability of the debtor," among other things. 11 U.S.C. § 524(a)(1)&(2) (1994). It was obtaining the final discharge in bankruptcy which was the goal of Vincent's unlawful scheme to defraud Joanne.

The filing of Vincent's bankruptcy petition did not ensure that a discharge would be obtained. The Bankruptcy Code explicitly provides that a discharge may be denied in situations where

> • the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred . . . or has permitted to be transferred . . . property of the debtor, within one year before the date of the filing of the petition . . . ;
>
> • the debtor has . . . falsified . . . any recorded information . . . from which the debtor's financial condition or business transactions might be ascertained . . . ; [or]
>
> • the debtor knowingly and fraudulently . . . made a false oath or account. . . .

11 U.S.C. § 727(a) (1994). If Vincent is eventually denied a discharge for any of these reasons, Joanne's debt owed by Vincent will survive in full unaffected by the bankruptcy proceedings.[10]

Thus, where a defendant, like Vincent Siragusa in the instant case, attempts to defeat a pre-existing debt by obtaining a discharge of the debt in bankruptcy court through a pattern of racketeering activity, the moment of injury is, by

---

[10] Moreover, until the bankruptcy case is closed, Vincent could choose to "reaffirm" his financial obligation to Joanne Siragusa. The Bankruptcy Code provides that a debtor may enter into a legal and enforceable reaffirmation agreement with a creditor. *See* 11 U.S.C. § 524(c)-(d) (1994). In such a situation, Joanne would have been made whole notwithstanding a discharge of Vincent's debts.

definition, the final discharge of the defendant's legal obligation to pay the debt. The racketeering activity may be completed, but the RICO injury may not occur unless or until a discharge is granted. The existence of the RICO injury is contingent on a future event.

Where the defendants' conduct in violation of the statute has already occurred but the plaintiff has not yet been injured, a cause of action has not yet accrued. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). Thus, in the context of an antitrust conspiracy, this Court has ruled that the cause of action accrues from the date the plaintiff "feels the adverse impact of" the violation, *id.* at 339, and that future damages "that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative. . . . " *Id.* In circumstances involving future damages for past conduct, this Court has held that "the cause of action . . . will accrue only on the date [damages] are suffered." *Id.*

The ruling in *Zenith* was applied to an attempt to obtain a fraudulent discharge of debt in bankruptcy by the Second Circuit in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988). There, the defendants were attempting to obtain a bankruptcy discharge of a corporation's lawfully incurred debts. After fraudulently transferring substantial assets out of the corporation, the defendants presented a bankruptcy plan whereby the creditors, including Bankers Trust, would receive only 17.5% of its debt with the remainder being legally discharged. *Id.* at 1105-06. At the time Bankers Trust filed its civil RICO case against the defendants, the bankruptcy trustee was attempting to recover the fraudulently transferred assets and a final discharge of debt had not become effective. *Id.* at 1099.

The Second Circuit dismissed that aspect of Bankers Trust's RICO claim seeking damages for loss of a legitimate debt due to defendants' bankruptcy fraud. The *Bankers Trust*

court reasoned that the pre-existing debt had not yet been finally discharged, and the trustee was attempting to recover the fraudulently transferred assets. If the trustee was successful in recovering the assets, the debt to Bankers Trust might be paid in full. *Id.* at 1106. If the trustee could not recover enough of the fraudulently transferred assets to pay off the pre-existing debt, only then would Bankers Trust incur an injury caused by the defendants' RICO activities.[11]

The analysis of the moment of injury in *Bankers Trust* is consistent with the statutory definition of the crime of bankruptcy fraud. Section 3284 of Title 18 makes clear that the crime culminates in the final discharge and that this is the date from which the limitations period begins to run:

> The concealment of assets of a debtor in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.

18 U.S.C. § 3284 (1994). *See United States v. Blizzard*, 27 F.3d 100, 103 & n.5 (4th Cir. 1994); *United States v. Knoll*, 16 F.3d 1313, 1318 (2d Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 574 (1994); *United States v. Del Percio*, 870 F.2d 1090, 1096 (6th Cir. 1987); *see also United States v. Guglielmini*, 425 F.2d 439, 443 (2d Cir.) (statute applies similarly to non-debtor

---

[11] *Cf. Barnett v. Stern*, 909 F.2d 973, 977 n.4 (7th Cir. 1990) (damage claims were "speculative (and premature)" because "it remains to be seen whether [plaintiffs] will be able to satisfy their claims from the bankruptcy estate"); *Hartford Life Insurance Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1173 (D.C. Cir. 1975) ("[t]he right to sue [under Loan Shark Act] did not accrue until the plaintiff had a cause of action," and, because plaintiff's cause of action "depended upon a prior adjudication of the rights of the trustee in bankruptcy," plaintiff's suit "was commenced well within the applicable limitations period").

defendant, *i.e.*, does not accrue as to non-debtor defendant until final discharge), *cert. denied*, 400 U.S. 820 (1970).

Thus, fraudulent *attempts* to defeat a pre-existing debt through bankruptcy fraud, whether those attempts are unsuccessful or unfinished, are simply insufficient to show injury actionable as a RICO claim. So long as RICO injury itself is "uncertain," the cause of action has not accrued. Here, defendants attempted to defeat Vincent Siragusa's pre-existing debt to Joanne by fraudulent bankruptcy filings and financial reorganizations. Until the conclusion of the bankruptcy, however, it is uncertain whether Joanne will suffer an injury and her cause of action has not accrued.

B. A Non-RICO Debt Becomes A RICO Injury Only When It Is "Lost," And Joanne Has Not Yet "Lost" Her Property Settlement Debt

The court of appeals identified Joanne's RICO injury as "the loss of her share of Vincent's medical practice interest." (Pet. App. 24a) The appeals court apparently refers to that aspect of the bankruptcy fraud by which the defendants attempted to hide Dr. Siragusa's assets by fraudulently transferring them to third parties. This characterization of Joanne's injury is inapt, however, because Joanne's underlying debt, based on the property settlement with Vincent and subsequent state court judgment, is unaffected by the attempted fraudulent transfers.

Vincent's fraudulent bankruptcy petition, purportedly indicating that ownership of his medical practice was transferred to others, does not in and of itself constitute an injury to Joanne. At most, these events reveal an attempt by the defendants to injure Joanne's security

interest that protected the pre-existing property settlement debt. Joanne released her one-half community property interest in Vincent's medical practice in return for periodic payments that were themselves protected by a security interest in Vincent's medical practice. But an attempt, even a successful attempt, to subvert an underlying security interest or insurance policy is not itself a RICO injury unless and until the debt that is being secured is "lost."

The First Circuit twice has looked at this situation and, each time, declined to find a RICO injury, citing *Bankers Trust* with approval in each case. In *Lincoln House, Inc. v. Dupre*, 903 F.2d 845 (1st Cir. 1990), the plaintiff had sued the defendant in state court for breach of contract damages. The plaintiff subsequently filed a civil RICO case alleging that the defendant was fraudulently transferring his property in an effort to become judgment-proof should there be damages in the state court proceeding. The court of appeals found that the plaintiff's RICO claim was not ripe for adjudication because the plaintiff's alleged RICO injury "is clearly contingent on events that may not occur as anticipated or may not occur at all." *Id.* at 847. Since the state court action had not been decided, and since no potential debt had been "lost" as yet, the "hypothetical inability to recover" was not the type of injury actionable under RICO.

The same result ended the plaintiff's attempt to pursue a civil RICO claim in *Bennett v. Centerpoint Bank*, No. 91-1603, 1991 U.S. App. LEXIS 32856 (1st Cir. Dec. 31, 1991). The plaintiff was the chairman of the board of a failed banking venture, and the defendants were, among others, his former board members. The plaintiff and the defendants had given personal guarantees for a corporate loan used to get the banking venture underway. The

plaintiff alleged, in essence, that the defendants fraudulently used corporate assets to enrich themselves personally and to obtain releases from their personal guarantees on the corporate loan. *Id.* at *7. His alleged RICO injury was exposure to suit for the banking venture's unpaid debt without the financial support of his co-guarantors of the corporate loan. Finding that "exposure does not equal injury," the First Circuit ruled that the injury was insufficient to maintain a civil RICO action. *Id.* at *17. The plaintiff had not yet been forced to cover *any* of the banking venture's debt, and even more to the point there was no evidence that he would have to pay more than he would have paid "if the defendants had never committed a predicate act. The injury, therefore, is speculative and the suit, at the very least, premature." *Id.* at *8 (citing *Bankers Trust, supra*).

Even the fraudulent reduction of the value of the collateral on non-recourse mortgage loans has been held not itself to result in an actionable RICO injury where the original mortgage debt was not yet "lost." In *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 728 (1995), the plaintiff lender alleged that the defendant mortgage broker fraudulently inflated the value of the properties pledged as collateral to secure non-recourse mortgages on those properties. The lender maintained that it had been injured by this scheme because the loans would not have been made but for the fraudulent inflation of value. The resulting loans were, as a consequence, undersecured, giving the lender an additional risk of loss. *Id.* at 768. The court found, however, that the lender had as yet suffered no RICO injury. It was insufficient for a civil RICO cause of action for the lender to claim that "it incurred additional risk of loss as a consequence of the fraud." *Id.*

Whether the lender suffered RICO injury could be determined only once there was a foreclosure on one of the affected properties and the collateral proved insufficient to pay the debt. *Id.* at 769.

Notably, the Ninth Circuit itself has recognized that a fraudulent attack on the underlying insurance against loss does not, in and of itself, constitute an actionable RICO injury. The defendant in *Berg v. First State Insurance*, 915 F.2d 460 (9th Cir. 1990), canceled without notice the liability policies of six Getty Oil directors. The cancellation took place when the defendant learned that the directors were potentially liable for billions of dollars in threatened shareholder derivative suits as a result of the Texaco/Pennzoil battle for control of Getty Oil. *Id.* at 462. The directors brought a civil RICO action against First State. Subsequently, Texaco paid all of the expenses of the directors in the derivative lawsuits, and First State sought dismissal of the RICO case on the grounds that the plaintiff had suffered no injury. The Ninth Circuit agreed, finding that the directors had "suffered no financial loss." *Id.* at 464. Though the insurance polices may have been fraudulently canceled, reasoned the court of appeals, the plaintiffs suffered no loss since their "claims" had been covered by other means.

The RICO scheme against Joanne's underlying security interest in the medical practices places her in a position akin to the lenders in *First Nationwide* and the directors of *First State*. The attempted fraudulent transfer of the medical practice by Vincent, even if ultimately successful, would not cause Joanne RICO injury unless any of her original property settlement debt is "lost." Only at the point where she must turn to the security to pay for the loss she has incurred and finds that that security is insufficient to cover the lost debt will she

suffer a RICO injury. Until that time, the effect of defendants' fraudulent scheme is speculative and premature. There is no conclusive evidence yet that the original debt will or will not be paid in full, and no indication that the defendants' RICO activities will result in any "lost debt." Indeed, there is no saying that Joanne will receive one cent less on her pre-RICO debt than "if the defendants had never committed a predicate act." *Bennett*, 1991 U.S. App. LEXIS 32856, at *8.

C. Because The Relief That Joanne Sought Through Her Bankruptcy Complaint – *i.e.*, Equitable Relief – Is Not Available To A Civil RICO Plaintiff, A RICO Claim Would Have Been Premature Prior To The Resolution Of The Bankruptcy Proceedings

The prematurity of Joanne's RICO claim at the time she filed her initial adversary proceeding complaint in bankruptcy court – at which time, according to the court of appeals, Joanne's RICO claim accrued, (Pet. App. 24a) – is further evidenced by the relief she sought in the bankruptcy complaint. Faced with an attempted fraudulent transfer and an effort to obtain discharge of her property settlement debt, Joanne principally sought equitable relief. To this end, she asked the bankruptcy court to:

1. Determine that the lien on the medical practice was senior and valid;
2. Declare the Sale and Transfer of the medical practice void and order rescission; and
3. Declare a Constructive Trust and compel debtor and others to transfer the medical practice and account for the proceeds.

(J.A. 187)

Her RICO complaint, if filed at the time the court of appeals ruled that her cause of action accrued, necessarily would have sought similar relief from the attempted fraudulent transfers. At that point, at the beginning rather than at the end of the bankruptcy, her monetary "damages" were unknown. The injury from the RICO activity of the defendants at that point could only have been addressed by seeking the equitable relief necessary to unravel the attempted fraudulent transfers, as indicated in her adversary complaint filed in Bankruptcy Court.

The court of appeals, however, has determined that equitable relief is unavailable to RICO plaintiffs such as Joanne pursuant to 18 U.S.C. § 1964(c). In *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the Court reviewed the statute and the legislative history and concluded:

> The clear message from the legislative history is that, in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.

Id. at 1086 (emphasis in original); *see also In re Fredeman Litigation*, 843 F.2d 821 (5th Cir. 1988) (following *Wollersheim*); 2 MATTHEWS, WEISSMAN & STURC, CIVIL RICO § 8.05, at 8-175 (2d ed. 1992) (noting that "the *Wollersheim/Fredeman* position has been adopted by a clear majority of the courts considering the issue.").[12]

---

[12] The Ninth Circuit noted that the model for civil RICO, the Clayton Antitrust Act, contained an express provision for private injunctive relief whereas RICO was silent, creating a strong indicia of congressional intent against implying such relief under the Supreme Court's decisions governing implied rights of action. *Wollersheim*, 796 F.2d at 1088; *see also In re Fredeman Litigation, supra*.

In May 1989, Joanne sought the traditional equitable relief of a plaintiff faced with an attempt to hide assets from ultimate use to repay debts. At that point, the RICO activity had resulted only in the first step of the scheme: the filing of the bankruptcy petition and the corresponding fraudulent transfer of Vincent's valuable assets. The next step of the RICO activity, as it applied to Joanne, was to obtain the legal discharge of Vincent's substantial property settlement debt, or at least a substantial portion of that debt. The final step for the defendants was then to return the fraudulently transferred assets to Vincent, or at least to his control and use. By May 1989, while the first step had been accomplished, Joanne had not yet suffered any injury. At that time she was left with seeking principally equitable relief to undo the fraudulent attempts to transfer Vincent's assets and enjoining the future steps in the scheme which would, in fact, cause her "concrete financial loss."

Whether the RICO activity in this case ever leaves Joanne with a "lost debt" has yet to be determined. She may yet be paid her pre-RICO debts in full, either by the bankruptcy trustee or by Vincent. If she receives less than 100% of those pre-existing debts at the conclusion of the bankruptcy as a result of RICO activity, then she will have suffered a RICO injury. Until that point her cause of action has not yet accrued.

II. THE "INJURY AND PATTERN DISCOVERY" ACCRUAL RULE IS REQUIRED BY THE CIVIL RICO STATUTE AND BY GENERAL PRINCIPLES OF ACCRUAL

A. The Language, Structure And Policies Of The Civil RICO Statute Compel The "Injury And Pattern Discovery" Rule

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994), does not contain a specific provision directly addressing when the statute of limitations in a civil RICO action accrues. In the face of the statute's silence on this issue, some courts have ruled that the statute of limitations period runs when a plaintiff knows or should know of her injury.[13] This "injury discovery" accrual rule, however, does not comport with the language, structure and policies of the RICO statute. A careful analysis of RICO demonstrates that the four-year statute of limitations period[14] should not begin to run until the plaintiff knows or should have known both her injury *and* that her injury was the result

---

[13] For purposes of this section, petitioners assume, *arguendo*, that they suffered an injury at the time of the bankruptcy filings in 1989. As set out in Part I above, petitioners contend that an injury to petitioners, if any, will not be suffered until the conclusion of the bankruptcy proceedings and, accordingly, there is no need to reach the issue of the proper accrual rule for civil RICO actions.

[14] In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), the Court held that all RICO claims were subject to a uniform four-year statute of limitations. The Court expressly declined to decide when this limitations period begins to run. *Id.* at 156-57.

of a pattern of racketeering (the "injury and pattern discovery" rule).[15]

"[T]he heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 154 (1987) (emphasis in original). This is evident from the very elements of a civil RICO claim. To prove a civil RICO cause of action, one must demonstrate (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity (known as "predicate acts"); (5) causing injury to

---

[15] In their appeal to this Court, petitioners focus on the differences between the "injury discovery" rule followed by the Ninth Circuit below and the "injury and pattern discovery" rule that has been adopted by the Sixth, Eighth, Tenth and Eleventh Circuits. *See* Cert. Pet. at 7-8. In fact, courts have announced a variety of other accrual rules, *see Bingham v. Zolt*, 66 F.3d 553, 559 (2d Cir. 1995) (and cases cited therein), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1418 (1996), with the Third Circuit's "last predicate act" rule being the most prominent. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). The "last predicate act" rule provides that

> the limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of the civil RICO cause of action existed unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern.

Id. at 1130. Because petitioners' RICO action also would be timely under the "last predicate act" rule, petitioners do not address this Third Circuit test except to note that much of the reasoning in favor of the "last predicate act" rule applies equally to the "injury and pattern discovery" rule.

the plaintiff's "business or property." 18 U.S.C. §§ 1962(c), 1964(c) (1994); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). In creating the "pattern of racketeering" concept, RICO employed an entirely new approach to fighting the increasingly sophisticated threat posed by organized criminal activity. It is the "pattern of racketeering activity" concept, along with the private civil remedy provisions, which lies at the core of RICO and gives the statute utility as a weapon against organized criminal activity. Accordingly, discovery of the pattern of racketeering should be a necessary prerequisite for commencement of the running of the statute of limitations. *See* Paul B. O'Neill, *Mother of Mercy, Is This The Beginning of RICO? The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. Rev. 172, 234-42 (1990).

Section 1961(5) of RICO defines a "pattern of racketeering activity" as at least two predicate acts of racketeering activity, "the last of which occurred within ten years . . . after the commission of a prior act of racketeering." This statutory provision manifests Congress' desire to have courts accept evidence relating to the RICO predicate acts that is up to ten years in the past. "In selecting a term of ten years within which predicate acts could occur to establish the pattern requirement, Congress must have contemplated recovery for remote acts and even for remote injuries." *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991). In striking the balance between a defendant's desire for repose and for fresh evidence and a plaintiff's right to recover for past wrongs, the statute plainly anticipates that plaintiffs will be given extensive leeway to look to the past in seeking to obtain compensation for their injuries. The restrictive "injury discovery" accrual rule, therefore, conflicts with the clear intent of RICO to allow plaintiffs to go back at least ten years into

the past. As the Third Circuit concluded concerning the "injury discovery" rule:

> Congress in enacting the ten year limit must have envisioned causes of action which would involve patterns of racketeering extending over that period of time. It would be inconsistent with this breadth of definition for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four years. To do so would encroach upon and limit a legislatively-enacted scheme to provide recovery for racketeering injuries. *See* 18 U.S.C. § 1961(5), 1964(c).

Keystone, 863 F.2d at 1132-33.

The very type of racketeering acts targeted by RICO also highlights the difficulties faced by a plaintiff in discovering the existence of a RICO cause of action. The predicate acts listed in 18 U.S.C. § 1961(1) include numerous fraud-related crimes: 18 U.S.C. § 664 (embezzlement from pension and welfare funds), 18 U.S.C. §§ 891-894 (extortionate credit transactions), 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), 18 U.S.C. § 1954 (unlawful welfare fund payments). In practice, mail fraud, wire fraud, or securities fraud have been the most commonly pled of the predicate acts in RICO lawsuits. *See Agency Holding Corp.*, 483 U.S. at 149.[16] Fraud, by its very nature, is a crime of concealment and

---

[16] *See* Report of the Ad Hoc Civil RICO Task Force of the American Bar Association Section on Corporations, Banking and Business Law at 57 (1985) (92% of civil RICO cases in which there had been a published decision relied upon mail, wire or securities fraud for their predicate acts).

deception. "Actual fraud, by definition, consists of any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another – something said, done or omitted with the design of perpetrating what is known to be a cheat or deception." *In re Eashai*, 87 F.3d 1082, 1089 (9th Cir. 1996); *see also Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996); *Hobson v. Wilson*, 737 F.2d 1, 33 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). The typical RICO claim demands that a plaintiff discover not one, but at least two predicate acts of fraud.[17]

In addition, potential plaintiffs face special problems in attempting to uncover a RICO fraud. RICO typically involves schemes taking place through the operation of legitimate enterprises. It was the infiltration, assumption of control, and operation of legitimate businesses and unions which Congress aimed at halting in enacting RICO. *See* S. Rep. No. 91-617, 91st Cong., 1st Sess. 76 (1969). *See also United States v. Turkette*, 452 U.S. 576, 591 (1981) ("the major purpose of Title IX . . . is to address the infiltration of legitimate business by organized crime"); 2 MATTHEWS, WEISSMAN & STURC, CIVIL RICO § 5.02, at 5-7 to 5-10 (2d ed. 1992) ("the predominant articulated goal of the statute was to protect legitimate businesses from infiltration by organized crime"). As was the case with attorney Patricia Brown and her law firm here, the fact that

---

[17] Moreover, courts have interpreted the "continuity plus relationship" requirement to mean that plaintiffs must prove more than simply two predicate acts. *See, e.g., Northern Trust Bank v. Inryco, Inc.*, 615 F. Supp. 828, 830 n.5 (N.D. Ill. 1985) ("for RICO purposes two mailings do not a 'pattern' make"); *see also* DAVID SMITH & TERRANCE REED, CIVIL RICO § 4.04, at 4-27 to 4-76 (1992).

frauds are perpetrated by "respectable businesses" makes them especially tough to uncover.

Thus, a party faces a daunting task in discovering a RICO cause of action: before filing suit, a RICO plaintiff must root out multiple fraudulent acts and trace this fraudulent conduct to the operation of an apparently legitimate business enterprise. Because of its restrictive nature in starting the limitations period at the earliest possible moment, the "injury discovery" rule does not give proper weight to the challenge of uncovering such frauds. The "injury discovery" rule defeats the very purpose of the statute by not allowing a plaintiff sufficient time to piece together the RICO scheme. For this reason, the "injury and pattern discovery" rule is superior in that it recognizes the inherent problems that victims of fraud schemes face in developing a RICO claim and ties the accrual of the civil RICO action to discovery of the RICO pattern.

Moreover, given that RICO actions typically rely on fraud allegations, it is telling that "injury discovery" is *not* the accrual rule governing fraud cases. Under federal law generally, the statute of limitations on a fraud claim does not begin to run when the plaintiff reasonably learns of her injury; rather, the limitations period commences only after the plaintiff discovered or should have discovered the fraud itself. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) ("this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it.' ") (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.)

342, 348 (1875)); *La Porte Construction Company, Inc. v. Bayshore National Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *Briley v. State of California*, 564 F.2d. 849, 855 (9th Cir. 1977); *Hartford Life Insurance Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1174 (D.C. Cir. 1975); *see also* 54 C.J.S. *Limitations of Actions* § 192 at 250 (1987) ("General Principles. In equity and under various statutes, the statute of limitations in cases of fraud ordinarily runs from the time when the fraud is, or should be, discovered.") (and cases cited therein).

Since knowledge of injury alone is insufficient to begin accrual of the statute of limitations in a simple fraud lawsuit, it surely should not be enough for accrual of the larger, more complicated RICO fraud action. To allege a RICO action, the plaintiff must discover the whole "fraud," namely, the two underlying frauds which are part of a pattern and which are operating through legitimate enterprises. It is this pattern of wrongdoing that forms the basis of the RICO cause of action; hence, following the spirit and reasoning of the federal fraud accrual rule, the limitations period should begin to run only after this pattern of unlawful behavior is discovered by plaintiff. Yet, the "injury discovery" rule would require a more restrictive rule for a civil RICO case than for an ordinary federal fraud case. Consequently, adoption of the "injury discovery" rule could lead to the indefensible result whereby the statute of limitations would expire on the RICO claim (since the victim learns early on that she was injured) long before the limitations period even begins to run on the underlying fraud predicate act (since it may be a lengthy period of time before the plaintiff first learns that she was the victim of an intentional fraud, and not simply bad luck or negligence).

The drafters of RICO included a liberal construction clause to ensure that courts did not construe the statute's ambiguities too narrowly. RICO states that "The provisions of this title shall be liberally construed to effectuate its remedial purpose." Racketeer Influenced and Corrupt Organizations Act, ch. 96, § 904(a), 84 Stat. 947 (1970), note following 18 U.S.C. § 1961. "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Sedima*, 473 U.S. at 498. The language of the statute, as well as "Congress' self-consciously expansive language and overall approach," mandate that RICO be read broadly. *Id.*; *see Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1555 n.11 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991); *Keystone*, 863 F.2d at 1128 & nn. 3-4 (and cases and articles cited therein). The cramped "injury discovery" accrual rule would not serve RICO's remedial purpose. Instead, it would diminish the recoveries available to the private attorneys general and prevent RICO from achieving its full remedial and policing potential. *Id.* at 1131-32. The "injury discovery" rule is therefore inconsistent with the liberal construction mandate and should be rejected.

This Court has recognized that the pattern and enterprise concepts embodied in the RICO statute represent a unique approach to combatting criminal activity that is "simply unknown to common law." *Agency Holding Corp.*, 483 U.S. at 150. Thus, a civil RICO cause of action requires a rule of accrual that is consistent with the presence of these unique elements. The "injury and pattern" rule is the only accrual rule that recognizes the central role played by the RICO pattern requirement.

B. General Principles Of Accrual Compel The Adoption Of The "Injury And Pattern Discovery" Rule

Proponents of the "injury discovery" rule fundamentally misconstrue federal accrual principles. The case law governing general principles of accrual plainly confirms the appropriateness of an "injury and pattern" discovery rule for civil RICO actions.

A leading decision of this Court on statute of limitations accrual is *United States v. Kubrick*, 444 U.S. 111 (1979). In *Kubrick*, the plaintiff filed suit under the Federal Tort Claims Act for hearing loss suffered as a result of his medical treatment at a Veterans Administration hospital. Although aware that he had suffered hearing loss due to his hospital treatment in 1969, Kubrick did not realize that he could bring a legal action against the United States for negligent treatment until 1972. When Kubrick filed suit in 1972, the United States moved to dismiss on statute of limitations grounds. The United States argued that the two-year limitations period had accrued in 1969 when Kubrick learned of the relevant facts relating to his claim. Kubrick opposed this motion, contending that accrual should not occur until he discovered the legal significance of these underlying facts.

The Supreme Court rejected Kubrick's argument that the statute of limitations should not begin to run until a plaintiff discovers a legal theory for recovery. In finding for the United States, however, the Court did *not* adopt an "injury discovery" rule. Instead, the Court held that a claim accrues "when the plaintiff knows *both* the existence *and the cause* of his injury." *Id.* at 113 (emphasis added). In 1969, Kubrick had discovered the "factual predicate for a claim against the VA." *Id.* at 118. At that

time, Kubrick knew far more than that he had been hurt – he knew the "critical facts" relating to his injury and "who ha[d] inflicted the injury." *Id.* at 122. Therefore, the statute of limitations began to run in 1969 since that was when "Kubrick was aware of his injury and its probable cause." *Id.* at 118.

Given the unique structure of RICO, knowing the "cause" of the RICO injury involves discovering that defendants were operating an enterprise through a pattern of racketeering. The pattern of racketeering *is* the "factual predicate" of a RICO claim. Thus, Joanne Siragusa did not know the "factual predicate" of her RICO claim until Dr. Heeren came forward in December 1990. Until that time, Joanne Siragusa had only limited knowledge of her husband's acts against her. Prior to December 1990, she did not know that the source of her injury was defendant Patricia Brown and her law firm. She also did not discover until December 1990 that her injury was caused by an enterprise operating through a pattern of racketeering and that this pattern of illegal activity had other victims. While Joanne was aware of her injury (assuming, *arguendo*, that she suffered any injury, *see* Part I *supra*) prior to December 1990, it was not until the affidavit of Dr. Heeren that she learned the "causation" of her RICO claim, consistent with *Kubrick*.

In determining the point of accrual for federal causes of action, other courts also have required more than mere knowledge of injury. Consistent with *Kubrick*, courts have required that the plaintiff "have knowledge of the factual predicate of his claim" as well as the role of the defendants. *Lavellee v. Listi*, 611 F.2d 1129, 1131-32 (5th Cir. 1980); *see also Outman v. United States*, 890 F.2d 1050, 1052 (9th Cir. 1989) (plaintiff had been "personally aware of the 'factual predicate' of his claim"); *Nicolazzo v. United*

States, 786 F.2d 454, 456 (1st Cir. 1986) (plaintiff had not learned "the factual predicate" for his claim); *Harrison v. United States*, 708 F.2d 1023, 1027 (5th Cir. 1983) (plaintiff must have knowledge of "factual predicate"); *Santana v. United States*, 693 F. Supp. 1309, 1312 (D.P.R. 1988) ("factual predicate" must have become apparent, *i.e.*, plaintiff must be "armed with facts about the harm done to him to place him on notice").

Following the teachings of *Kubrick*, federal courts also have found that the limitations period does not commence until the plaintiff has knowledge of who caused the injury.

> The general federal rule is that the statute [of limitations] does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights. Plaintiffs must know or have reason to know that they were injured, *and must be aware or should be aware of who inflicted the injury.*

Rozar v. Mullis, 85 F.3d 556, 561-62 (11th Cir. 1996) (citations and quotations omitted; emphasis added). *See also Nasim v. Warden, Maryland House of Correction*, 64 F.3d 951, 955 (4th Cir. 1995) ("[F]or a cause of action to accrue, it is critical that the plaintiff know that he has been hurt and who inflicted the injury."), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1273 (1996); *Goodhand v. United States*, 40 F.3d 209, 212 (7th Cir. 1994) ("Until the plaintiff knows that he has been injured and by whom or by what, he has no reason to take steps to determine whether he might have a legal claim."); *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987) ("Nor will a Section 1983 action accrue until the plaintiff is aware or should have been aware who has inflicted the injury."); *Stewart v. Parish of Jefferson*, 951 F.2d 681, 684 (5th Cir.) ("The statute of limitations period

commences once the plaintiff acquires possession of two critical facts: (1) an injury has occurred; and (2) the identify of the person who inflicted the injury."), *cert. denied*, 506 U.S. 820 (1992). Thus, these precedents also support a requirement that, before the statute begins to run, a RICO plaintiff must discover more than her injury; for accrual of the statute of limitations, she also should reasonably be aware of the identity of the defendant and the predicate acts that form the pattern of racketeering activity. Joanne Siragusa was not aware of either of these key facts until Dr. Heeren came forward in December 1990.

As discussed above, *supra* at 31-32, the federal accrual rule for fraud actions also is not "injury discovery" alone. It is discovery of the fraud, and not the injury, which is key in federal fraud actions: "the statute of limitations would not start to run in a fraud case until the fraud was exposed, even if the defendant had made no effort to conceal it beyond what is implicit in committing fraud. . . ." *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 851 (7th Cir. 1996); *see supra* at 31-32. A comparable rule in the RICO context would require that the limitations period begin to run only after the plaintiff has discovered the basis of the RICO violation, *i.e.*, the pattern of predicate acts constituting the RICO offense.

This Court's treatment of "continuing violations" – *i.e.*, where defendant engages in a series of wrongful acts – also argues powerfully for the "injury and pattern discovery" accrual rule. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), defendant had engaged in five separate incidents of discrimination in violation of the Fair Housing Act, but only one of the wrongful acts was within the limitations period. The *Havens Realty* Court concluded that all five incidents should be deemed timely because they constituted a "continuing violation" with at

least one of the wrongful acts within the limitations period.

> [A] "continuing violation" of the Fair Housing Act should be treated differently from one discrete act of discrimination. . . . Petitioners' wooden application of [the statute of limitations provision], which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act. Like the Court of Appeals, we therefore conclude that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely.

Id. at 380-81 (citations and footnote omitted). Federal courts also have applied an expansive view of accrual for continuing violations in connection with other statutes. *See Fowkes v. Pennsylvania Railroad Co.*, 264 F.2d 397, 399 (3d Cir. 1959) (Federal Employer's Liability Act; "postponing of the running of the statute of limitations . . . in . . . situations involving continuing or frequently repeated wrongs"); *Held v. Gulf Oil Co.*, 684 F.2d 427, 430 (6th Cir. 1982) (Title VII; suit timely where pattern of discriminatory acts continues into the limitation period, even though discriminatory acts commenced prior to limitation period); *Acha v. Beame*, 570 F.2d 57, 65 (2d Cir. 1978) (same).

With its requirement of the commission of at least two related predicate acts, RICO is, by its terms, a continuing violation statute.[18] This Court has stressed that a RICO plaintiff must prove continuity as part of a RICO

---

[18] "[I]t is the continuing nature of the violation that is the very essence of a RICO claim." *Cook County v. Berger*, 648 F. Supp. 433, 434 n.1 (N.D. Ill. 1986).

action. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240-42 (1989). To establish a pattern of racketeering activity, plaintiffs must show that the defendant committed at least two predicate acts that amount to, or threaten, continued criminal activity. *Id.* In addition, RICO, like the Fair Housing Act, embodies a "broad remedial intent" on the part of Congress. Consequently, *Havens Realty* and the federal accrual rule for "continuing violations" are directly relevant to civil RICO. Just as this general rule for "continuing violations" considers the early wrongful acts that are part of a continued violation to be within the applicable limitations period, the continuity aspect of a RICO violation should be reflected by having the statute of limitations only begin to run on earlier predicate acts when the plaintiff reasonably discovers the existence of the pattern of racketeering activity. A more restrictive accrual rule would be a "wooden" application of the statute of limitations and should be rejected.[19]

---

[19] Although the Court borrowed RICO's four-year statute of limitations from antitrust law, *Agency Holding Corp.*, 483 U.S. at 152-53, antitrust accrual is based on the idea that an antitrust violation is a discrete act. Antitrust law has no discovery rule, *see, e.g., Harold Friedman Inc. v. Thorofare Markets Inc.*, 587 F.2d 127, 138 n.41 (3d Cir. 1978), even though a discovery rule ensures that the limitations period does not begin to run before a plaintiff can reasonably be expected to discover some or all of her claim. Discovery rules have been implied in virtually all other federal causes of action, *see, e.g., Aparicio v. Norfolk & Western Railway Co.*, 84 F.3d 803, 814-15 (6th Cir. 1996) (Federal Employer's Liability Act); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) (Title VII of the Civil Rights Act of 1964), and are especially important for RICO given the complex frauds and corruption which serve as the basis for RICO actions. *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 152-54 (8th Cir. 1991). "Every court that has considered an accrual rule for civil RICO has adopted some sort of discovery

In their discussions of accrual principles, courts often appear to use the discovery of the injury as a shorthand. In doing so, these courts implicitly assume in their opinions that the plaintiff also learned of the "causation of the injury" or the facts of the fraud at the same time that she learned of the injury itself. To the extent that the "injury discovery" rule takes into account the fact that it is a "RICO injury" which is being discovered, the differences between the two rules may be largely semantic. "Conceptually there is no requisite RICO 'injury' until the damage impacting the plaintiff becomes part of a pattern of racketeering activity. Prior to that point there is no *RICO* injury and the statute of limitations may not begin to accrue." *Keystone*, 863 F.2d at 1131. When a plaintiff has discovered or should have discovered her "RICO injury" – that is, that she suffered an injury which was part of a pattern of at least two related predicate acts – the statute of limitations should begin to run. However, a potential plaintiff has yet to discover her "RICO injury" when she knows only that she has suffered some injury, but has no notion of who caused the injury, has no knowledge that it was an illegal act, and has no idea that there were other victims of the same or a related fraudulent scheme. It would be premature and grossly unfair for the limitations period to run on a complicated, important cause of action

---

rule." *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992). There can be no dispute that, in light of the absence of the discovery principle, the antitrust accrual rules are inapplicable in the RICO context. *See, e.g., Granite Falls Bank*, 924 F.2d at 152-53 (setting out reasons why antitrust analogy is inapposite for civil RICO accrual); *cf. Sedima*, 473 U.S. at 485-86 (rejecting antitrust analogy in construing the injury requirement under § 1964(c) for standing to sue for a civil RICO action).

such as RICO based on a plaintiff's limited knowledge that she has suffered an injury of some sort.

C. An "Injury And Pattern Discovery" Accrual Rule Would Avoid Anomalous And Inappropriate Results

As demonstrated above, the "injury and pattern discovery" rule best fits the language and structure of RICO and the established federal law accrual principles. In addition, the "injury and pattern discovery" rule avoids the inappropriate and indefensible outcomes which can arise when the "injury discovery" rule is applied in the RICO context.

The most astounding outcome under the "injury discovery" accrual rule is that a plaintiff's RICO claim can be barred by the statute of limitations before her RICO cause of action ever existed. The loss of a RICO claim before it ever exists takes place in instances where the second predicate act occurs more than four years after the first predicate act. Where the plaintiff is the victim of the first predicate act and learns of her injury at the time of commission, the "injury discovery" rule would have the statute of limitations begin to run immediately. Under that rule, the limitations period will expire four years from the date of the first predicate act. Yet the pattern requirement set out in RICO provides that two predicate acts occurring any time within a ten-year period form the basis of a RICO pattern. 18 U.S.C. § 1961(5) (1994). Therefore, the RICO cause of action cannot exist until the second predicate act occurs. Yet if the second predicate act takes place more than four years after the first predicate act (the statute anticipates up to ten years between the first and second predicate acts), then the "injury

discovery" rule would preclude the victim of the first predicate act from bringing suit to recover for her injury. In these circumstances, the party injured by the first predicate act is barred from bringing suit before she ever had an opportunity to sue.

Depriving a potential plaintiff of her right to sue even before a cause of action ever came into being plainly violates all accepted principles of accrual. *See, e.g., United States v. Lindsay*, 346 U.S. 568, 569 (1954) ("In common parlance a right accrues when it comes into existence . . . "); *Amy v. Dubuque*, 98 U.S. 470, 476 (1878) (a cause of action only accrues when a right to sue attaches); *Wilcox v. Executors of Kemp Plummer*, 29 U.S. (4 Pet.) 172 (1830) (same). Furthermore, such a result cannot be reconciled with the very purpose of the RICO statute. *See Keystone*, 863 F.2d at 1134 ("Under the [injury] discovery rule if a plaintiff suffers a single injury as a result of a predicate act but the second predicate act which establishes the necessary 'pattern' occurs five years after the injury to the plaintiff, that plaintiff's claim is barred by the four year civil RICO statute of limitations. . . . In such cases the purpose of the statute is defeated by the simple discovery rule"); Paul B. O'Neill, *Mother of Mercy, Is This the Beginning of RICO? The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. Rev. 172, 235 (1990) ("To initiate the statutory period sooner [than all the elements exist] is potentially to restrict the plaintiff's cause of action in a way unauthorized by the statute and inconsistent with general principles of statutes of limitation"); Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 Minn. L. Rev. 827, 879 (1987) ("Because a potential plaintiff has not been injured under RICO until the pattern element has been satisfied,

it is inappropriate to start the limitations period before the pattern is fully developed.").

Having the limitations period expire before the cause of action even exists is, on its face, absurd. Yet, this is the logical result of the "injury discovery" rule. Although this extreme outcome may not arise frequently, it underscores the harsh reality of the "injury discovery" rule. Under this "injury discovery" rule, the victim of the first predicate act does not have the four-year statute of limitations established by this Court in *Agency Holding Corp., supra*. Rather, the first injured party "loses" from her four year limitations period the entire time period from her injury until the second predicate act occurs. In other words, the limitations period is really four years minus this "lost" amount of time during which a cause of action does not yet exist and, indeed, might never exist without occurrence of a second predicate act.

For example, assume that victim A is injured by a predicate act in 1990 and is aware of her injury at the time that it occurs. Assume that the second predicate act in the pattern takes place in 1993 against victim B. Under the "injury discovery" rule, the statute of limitations period began to run in 1990 and expired in 1994. Yet, no RICO cause of action existed until the second predicate act took place in 1993. Thus, under the "injury discovery" rule, victim A did not enjoy the benefit of the four-year limitations period established by this Court in *Agency Holding Corp*. Instead, victim A has only one year: before the statute expires in 1994, victim A must uncover the second, 1993 fraud, ascertain whether it meets the pattern, continuity and other requirements of RICO, satisfy her Rule 11 obligations, and draft and file a RICO complaint that pleads her allegations with particularity pursuant to

Fed. R. Civ. P. 9(b).[20] This de facto shortening of the statute of limitations would occur in virtually every case under the "injury discovery" rule. Thus, a judicially created accrual rule would be allowed to rewrite RICO's four-year statute of limitations by fiat.

The "injury discovery" rule also would create a constricted limitations period because of the RICO continuity requirement. Courts have imposed a greater stringency on this continuity requirement in light of *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). In cases involving a "closed-ended scheme," courts have generally held that the minimum duration necessary to satisfy the continuity requirement is over one year. *See Religious Technology Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) (court could find no case in which continuity requirement was held to be satisfied by a pattern of racketeering activity lasting less than one year); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 609-11 (3d Cir. 1991), *cert. denied*, 504 U.S. 955 (1992) (12 months found to be insufficient period to demonstrate continuity in closed-ended scheme). By the time a true pattern of racketeering activity could be discovered, much of the four-year limitations period would have already run, leaving potential plaintiffs with insufficient time to investigate adequately the typically complex facts involved in a RICO case and prepare a proper complaint.

Some courts, including the court below, have suggested that this fundamental flaw in the "injury discovery" accrual rule – *i.e.*, the limitations period beginning to run before the cause of action exists, so that plaintiff is

---

[20] The underlying predicate acts of fraud must be pleaded with particularity under Fed. R. Civ. P. 9(b). *See, e.g., Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 196 (9th Cir. 1987).

deprived of some or all of the four year limitations period – can be patched up using some form of tolling doctrine. *See* Pet. App. 11a; *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 667-68 (1st Cir. 1990). These courts would espouse some sort of Rube Goldberg-esque conglomeration of "injury discovery" rule plus tolling doctrines to prevent anomalous results. No one, however, has outlined how this tolling would work or which of the assorted tolling principles would come into play.[21] This approach would add a whole layer of complexity to the question of civil RICO accrual, thereby defeating the goal of uniformity and predictability which this Court sought to achieve in *Agency Holding Corp.*, 483 U.S. at 154. The result of using some hybrid "injury discovery plus tolling" rule would be to "virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter." *Id.*[22]

---

[21] In fact, this is a distortion of the very concept of tolling. Tolling assumes that a cause of action exists and that the statute of limitations would ordinarily accrue. *See, e.g., Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1490 (D.C. Cir. 1989).

[22] Some courts of appeals decisions also have attempted to use a "separate accrual" concept to compensate for the "injury discovery" rule's problems. *See, e.g., State Farm Mut. Auto Ins. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring). The "separate accrual" rule, however, was designed to address older predicate acts which cause a new and independent injury within the limitations period. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103 (1988), *cert. denied*, 490 U.S. 1007 (1989). The "separate accrual" rule is plainly inapplicable to facts, such as the instant case, which involve two predicate acts with different victims, and this rule apparently does not permit a plaintiff to recover for injuries suffered more than four years before. Furthermore, the "separate accrual" rule shares many of the same deficiencies as the use of tolling doctrines to cure the

In the case of a simple, non-RICO tort action, an "injury discovery" rule has an obvious utility. With these simpler claims, the injury was the last act establishing the claim and invariably put the victim on notice of her potential cause of action. In the case of RICO, however, the injury caused by the first predicate act does not establish the last element necessary for the cause of action; it will be some period of time in the future, when the second predicate act occurs, that all the elements of the RICO cause of action are satisfied. As a consequence of this unique quality of a RICO action, the burden that the "injury discovery" rule seeks to place on the victim of the first predicate act is unprecedented in American law. In the typical tort case, the tort exists at the time that the party is injured and the victim need only to go out and investigate to discover her claim. Yet, the victim of the first predicate act in a RICO case has a very different chore. She cannot simply go out and discover those facts underlying her claim since her cause of action does not exist. Instead, the RICO plaintiff must remain vigilant for up to ten years in the future, seeking to discover a second predicate act that would signal a RICO cause of action. This is a far more onerous burden than that imposed on the ordinary tort victim or any other plaintiff and argues for the more expansive accrual rule provided by the "injury and pattern discovery" standard.

The restrictive "injury discovery" rule also does not take into account that, unlike the ordinary cause of action, the RICO action may be based on predicate acts

---

"injury discovery" rule's infirmities: the result is a complicated, hard to administer accrual regime which will lack the uniformity and predictability this Court called for in *Agency Holding Corp.* The "injury and pattern discovery" rule largely removes the need for the "separate accrual" doctrine.

inflicted on persons other than the plaintiff. The RICO plaintiff, therefore, may be required to search for a second predicate act, usually involving fraud, that possibly has an entirely different victim. In fact, under the "injury discovery" rule, the injured party would be expected to learn of this second fraud even before the second victim ever learned of the fraud or was aware that he was injured. Thus, Joanne Siragusa would be responsible for learning of the fraud against Dr. Heeren, even though she had no reason to suspect that he had been defrauded until Dr. Heeren came forward in December 1990. This further obstacle faced by the plaintiff seeking to discover a RICO action, once again, militates heavily against the restrictive "injury discovery" rule and in favor of the "injury and pattern discovery" rule.

The "injury discovery" rule is plagued by the fundamental problem that is present with any civil RICO accrual rule that focuses solely on knowledge of injury without regard to knowledge of pattern: knowledge of injury does not necessarily provide *any* notice of the existence of a RICO action. A plaintiff who has discovered her injury may have absolutely no reason to be aware of subsequent predicate acts committed by the same perpetrators, especially where, as in the case at bar, those acts were directed at defrauding someone other than herself. *See, e.g., Granite Falls Bank v. Henrikson*, 924 F.2d 150 (8th Cir. 1990) (plaintiff was a bank that discovered in 1985 that it had been defrauded, but did not discover until January 1989, in the course of litigation, that the defendant in the underlying action had been involved in a pattern of racketeering activity). Having the statute of limitations run before a plaintiff can reasonably be expected to discover the pattern of racketeering activity is unfair to plaintiffs and unduly limits their ability to

file meritorious RICO claims to obtain compensation for their injuries. *See Urie v. Thompson*, 337 U.S. 163, 170 (1949) (rejecting notion that cause of action should accrue and bar suit where plaintiff was in "blameless ignorance" and without "notice of the invasion of [his] legal rights"). By contrast, the "injury and pattern discovery" rule recognizes the inherent difficulties that an injured party must overcome in order to discover that her injury was caused by a pattern of racketeering activity. The limitations period in a civil RICO claim ought not in fairness begin to run until the victim discovers or should have discovered the existence of this pattern of unlawful conduct.

Because the narrow "injury discovery" rule starts the limitations period running before a pattern can be discovered, this rule will likely have the effect of forcing injured parties to file RICO lawsuits prematurely. Faced with the possible expiration of the limitations period, plaintiffs can be expected to file "protective lawsuits" before they have been able to investigate fully the RICO claim. With the statute of limitations running, injured parties will not be able to wait until a pattern of predicate acts emerges. Instead, plaintiffs' counsel may resort to gerrymandering single scheme RICO complaints or otherwise filing weak cases in the hope that they will eventually discover the pattern. The "injury and pattern discovery" rule is far preferable since it allows an injured party sufficient time to see if a RICO pattern develops and to investigate adequately her potential claims.[23]

---

[23] In this case, Joanne Siragusa filed her RICO action a few months after it became clear that her adversary complaint in bankruptcy against Brown and the law firm would be dismissed on jurisdictional grounds. Joanne was not a knowledgeable plaintiff sitting on her rights; she has been actively pursuing her claim since first learning of Brown's role in masterminding the fraudulent schemes. The "injury and pattern discovery" rule provides no comfort for the knowledgeable plaintiff. *Cf. Rodriguez v. Banco Cent.*, 917 F.2d 664, 667 (1st Cir. 1990) (criticizing "last predicate act" rule for allowing knowledgeable plaintiff to delay filing suit, but expressing sympathy toward a "pattern discovery"-type test which was not at issue before it). Under the "injury and pattern discovery" rule, a knowledgeable RICO plaintiff loses her claim if she delays since the statute of limitations begins to run as soon as the injured plaintiff learns of the racketeering activity. The "injury and pattern discovery" rule also ensures against the lazy plaintiff: if the injured party is not diligent in her efforts to discover the pattern, she will be deemed to have constructive knowledge and her claims will be barred as outside the limitations period. *See, e.g., Klehr v. A.O. Smith Corp.*, 87 F.3d 231 (8th Cir. 1996); *Association of Commonwealth Claimants v. Moylan*, 71 F.3d 1398 (8th Cir. 1995).

There can be no principled justification for adhering to a rule that permits the limitations period to expire before a pattern of racketeering has developed or where a plaintiff could not reasonably be expected to discover that it existed. This Court rejected an accrual rule which would begin the limitations period running at a time when the facts supporting plaintiff's action were "unknown and inherently unknowable." *Urie v. Thompson*, 337 U.S. at 169-70. Instead, the Court fashioned the discovery rule doctrine because it did not believe that the plaintiff should lose his right to recovery because of his "blameless ignorance" of the fact of his injury. *Id.* These basic principles of fairness should continue to guide the Court in determining the accrual rule for civil RICO actions. Joanne Siragusa should not be held to an "injury discovery" standard which requires her to discover facts which are "unknown and unknowable." In the context of RICO, the "injury and pattern discovery" rule

is the only accrual rule that provides an injured party with a fair opportunity to discover her RICO claim and to vindicate her interests under the statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ERVEN T. NELSON
ALVERSON, TAYLOR,
MORTENSEN & NELSON
3821 West Charleston Blvd.
Las Vegas, Nevada 89102
(702) 384-7000

RANDALL M. RUMPH
BARRY SHINEHOUSE
RUMPH & PEYTON
302 East Carson Avenue
Las Vegas, Nevada 89101
(702) 388-4466

RICHARD A. SAUBER*
MICHAEL L. WALDMAN
JONATHAN S. ARONIE
DAVID B. WISEMAN
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
1001 PENNSYLVANIA AVENUE, N.W.
SUITE 900
WASHINGTON, DC 20004-2505
(202) 639-7000

DAVID B. SMITH
ENGLISH & SMITH
526 King Street, Suite 213
Alexandria, Virginia 22314
(703) 548-8911

* *Counsel of Record*